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## **I. INTRODUCTION**

Plaintiff Frederick F. Fagal, Jr. (“Plaintiff” or “Fagal”) hereby responds in opposition to Defendant’s Marywood University’s Motion for Summary Judgment (ECF No. 62). While Marywood prefers to inflame these proceedings with references to Adolf Hitler, the Nazi regime, and genocide, this is actually a simple case of an employer violating its written disciplinary policies. Offering no warning or remediation, Marywood suspended and fired a long-tenured professor for publishing a video satirizing the University administration after it removed posters informing the community about a free-speech event. Now Marywood is attempting to argue that its “Progressive Discipline Policy” was not truly progressive and that the University had no obligation to comply with it anyway. The Court should reject Marywood’s excuses and deny its Motion for Summary Judgment.

## **II. PROCEDURAL COUNTER-HISTORY**

On January 15, 2015, Plaintiff filed an Amended Complaint. On February 23, 2015, Defendant filed a motion to dismiss under Rule 12(b)(6). The Court denied Defendant’s Motion to Dismiss on June 16, 2015. (ECF No. 29; ECF No. 30.) On June 30, 2015, Defendant filed an Answer to Plaintiff’s Amended Complaint and Affirmative and Other Claims.

The discovery period closed on September 6, 2016. On November 21, 2016, both parties both filed motions for summary judgment.

### **III. COUNTER-STATEMENT OF FACTS**

Plaintiff incorporates his Response to Defendant's Statement of Material Facts as well as his own Statement of Material Facts in Support of Motion for Summary Judgment, which is attached as Exhibit 70.<sup>1</sup>

### **IV. COUNTER-STATEMENT OF QUESTION INVOLVED**

Is Marywood entitled to summary judgment on any part of Plaintiff's Amended Complaint? The answer is no.

### **V. ARGUMENT**

#### **A. Legal standard for a motion for summary judgment**

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

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<sup>1</sup> All numbered exhibits are attached separately to Plaintiff's Exhibit Set in Opposition to Defendant's Motion for Summary Judgment.

moving party is entitled to a judgment as a matter of law.” *Wright v. Corning*, 679 F.3d 101, 103 (3d Cir. 2012).

**B. General legal standard for breach of contract**

“To state a breach of contract claim under Pennsylvania law, a plaintiff must allege ‘(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages.’” *Borrell v. Bloomsburg Univ.*, 955 F. Supp. 2d 390, 407 (M.D. Pa. 2013).

The Third Circuit and the Supreme Court of Pennsylvania have summarized the principles of contract interpretation:

The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties. The intent of the parties to a written agreement is to be regarded as being embodied in the writing itself. The whole instrument must be taken together in arriving at contractual intent. Courts do not assume that a contract’s language was chosen carelessly, nor do they assume that the parties were ignorant of the meaning of the language they employed. When a writing is clear and unequivocal, its meaning must be determined by its contents alone.

Only where a contract’s language is ambiguous may extrinsic or parol evidence be considered to determine the intent of the parties. A contract contains an ambiguity if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.

*Great Am. Ins. Co. v. Norwin Sch. Dist.*, 544 F.3d 229, 243 (3d Cir. 2008) (quoting *Murphy v. Duquesne Univ. Of The Holy Ghost*, 565 Pa. 571, 590-91, 777 A.2d 418, 429-30 (Pa. 2001)).

Ambiguities in a contract are construed against the drafter. See *Tax Matrix Techs., LLC v. Wegmans Food Markets, Inc.*, 154 F. Supp. 3d 157, 177 (E.D. Pa. 2016); *Shovel Transfer & Storage, Inc. v. Pa. Liquor Control Bd.*, 559 Pa. 56, 67, 739 A.2d 133, 139 (Pa. 1999). Even so, when a contract is ambiguous, the finder of fact must determine its meaning. See *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 587 (3d Cir. 2009). A court may grant summary judgment when the contract “is subject to only one reasonable interpretation.” *Emerson Radio Corp. v. Orion Sales, Inc.*, 253 F.3d 159, 164 (3d Cir. 2001).

**C. Legal standard for a breach of contract action between a private university and a professor**

Contracts between professors and private universities are construed no differently than contracts between other private parties. See *Waggaman v. Villanova Univ.*, No. 04-4447, 2008 WL 4091015, at \*20 (E.D. Pa. Sept. 4, 2008)<sup>2</sup>; *Murphy*, 777 A.2d at 428. A professor alleges a breach of contract by a private university by pleading that the university did not

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<sup>2</sup> All unpublished cases are attached separately to this brief.

comply with its own procedural rules. See *Waggaman*, 2008 WL 4091015, at \*20; *Murphy*, 777 A.2d at 433. A university must follow the procedures detailed in its contract “to the letter” and must fulfill these obligations “with good faith.” See *Murphy*, 777 A.2d at 434.

Marywood argues that a university “is entitled to use its discretion in...interpreting its own policies and procedures” and that it is “accorded deference in its...adherence to procedures.” Def. Mem. 15, 18. This is incorrect. In *Murphy*, a case involving the termination of a professor by a private university, the Supreme Court of Pennsylvania rejected a deferential standard of review. See 777 A.2d at 424, 428-29.

**D. Marywood breached its procedures when it suspended Plaintiff and terminated his tenure and employment.**

**1. Marywood breached its Progressive Discipline Policy.**

- (a) *Marywood failed to provide Plaintiff with any warnings or any opportunity for monitored assistance.*

Marywood argues that neither progressive discipline nor an opportunity for remediation were required. See Def. Mem. 9, 10. Marywood is wrong. As stated in the Progressive Discipline (“PD”) Policy, discipline imposed by Marywood is “progressive,” “corrective,” “gradual,” “educational,” and “remedial.” See Ex. 9. After a complaint occurs, the first disciplinary measure is an “oral warning.” See Ex. 9. Following that is a

“written warning.” See Ex. 9. And following that is “monitored assistance” or “special assistance,” where “applicable.” See Ex. 9.

Marywood asserts that progressive discipline was not required or “appropriate” because Erin Sadlack and Helen Bittel, members of the two faculty committees involved in this matter, concluded this. See Def. Mem. 9 (citing SMF ¶¶ 87, 89, 103, 105). Again, a university is not entitled to deference in interpreting its own procedures. See *Murphy*, 777 A.2d at 424, 428-29. Sadlack and Bittel emphasized the following sentence in the PD Policy:

Because the University regards disciplinary actions as corrective and not punitive, the policy recognizes personal and professional problems that may be rectified by an informal educational process, as well as serious violations of professional responsibilities implicating possible recommendation for suspension or dismissal.

See SMF Ex. O at 40:8-17 (underlined emphasis added); SMF Ex. T at 34:5-14 (same). However, this sentence is still consistent with the progressive application of warnings or monitored/special assistance for “serious violations of professional responsibility” (an undefined term). Before a recommendation for suspension or termination is made, an ad hoc committee determines whether the problem has been “successfully resolved” or has “not been corrected and reasons still exists to question the

fitness of the faculty member.” See Ex. 9 at DEF000251. Thus, the PD Policy requires that Marywood attempt to correct the problem before pursuing suspension or termination.

(b) *Since Plaintiff did not pose an “immediate harm” to himself or to others, Marywood could not suspend him.*

The PD Policy states that suspension “is justified if immediate harm to the faculty member or others is threatened by the person’s continuance in the faculty position.” Ex. 9 at DEF000249 (emphasis added). The policy provides no other criteria for determining whether a suspension is appropriate. See Ex. 9. Nor is “immediate harm” defined. See Ex. 9. Given the word “immediate” and the context in which “immediate harm” appears—the removal of a faculty member from campus—the phrase likely refers only to physical harm. Any interpretation allowing for emotional, reputational, or any other subjective form of harm would grant Marywood virtually limitless discretion to bar a faculty member from campus.

Marywood contends that the PD Policy does not state that a suspension is “only” justified by a threat of immediate harm. See Def. Mem. 9. Still, the wording, structure, and purpose of the policy suggest that “immediate harm” is the only justification for a suspension. No other justification is listed. Marywood would have the Court believe that it could

suspend a professor on a whim. Of course, this would strip the PD Policy of any claim to being “progressive.”

(c) *Only the Vice President for Academic Affairs could suspend Plaintiff.*

The PD Policy is clear about who is entitled to suspend a faculty member:

The faculty member may be suspended by the Vice President for Academic Affairs at any time during the proceedings involving him or her.

....

Having received a written recommendation for either suspension or dismissal from the Vice President for Academic Affairs, the President of the University sends a written communication to the faculty member....

Ex. 9 at DEF000249, DEF000250 (emphasis added).

Still, Marywood argues that the President is entitled to suspend a faculty member since the PD Policy does not use the phrase “only by the Vice President for Academic Affairs” and because the President outranks the VPAA. See Def. Mem. 10-11.

Marywood’s interpretation is wrong. First, the PD Policy fails to provide explicit suspension authority to the President even though it specifically addresses her role in other aspects of the disciplinary process—sometimes addressing the Vice President for Academic Affairs’

(“VPAA”) role in the same sentence. See *generally* Ex. 9. Clearly the PD Policy is designed to provide the President and VPAA with different authorities in the disciplinary process.

Second, the President does not always outrank the VPAA. The VPAA has final authority in a number of contexts at Marywood. See Ex. 21 at DEF3480, DEF3494, DEF3553, DEF3571. Most importantly, he or she is the “chief academic officer with direct responsibility for the proper functioning of the academic programs of the University.” Ex. 21 at DEF3480.)

Third, providing the VPAA with the exclusive authority to suspend faculty members would be consistent with his or explicit role in the “written warning” phase of the PD Policy. During that phase, which immediately precedes the suspension phase, the VPAA “shall conduct a preliminary investigation concerning the merits of the complaint.” Ex. 9 at DEF000249.

(d) *Marywood could not recommend the termination of Plaintiff’s employment and tenure in the absence of any efforts at remediation.*

The PD Policy states: “If remedial actions(s) taken during the suspension does not sufficiently resolve the issues that lead to the suspension, the university may move towards dismissal of the faculty

member.” Ex. 9 at DEF000250. Marywood argues that its policy “did not require remediation prior to termination in every instance.” Def. Mem. 9.

Marywood’s argument that remediation is optional is inconsistent with the wording and purpose of the PD Policy, and it is unworkable. The PD Policy states:

If the opinion of the Faculty Committee is that the matter is successfully resolved or that there is no merit to the complaint, a recommendation shall be made to discontinue proceedings. If the problem has not been corrected and reason still exists to question the fitness of the faculty member, the recommendation shall be to either continue a suspension or initiate a formal action toward dismissal.

Ex. 9 at DEF000251. Of course, this passage along with the “Dismissal” section contemplate that Marywood must at least attempt to remediate a problem prior to initiating dismissal.

Marywood’s argument also leaves itself, faculty members, faculty committees, and this Court with no criteria by which to determine the procedural propriety of some dismissals. Marywood is essentially arguing that it has the right to dismiss a professor any time that it prognosticates—without attempting remediation at all—that there is no hope for remediation.

- (e) *Marywood breached the contract by failing to convene an ad hoc faculty committee to review Plaintiff's suspension.*

The PD Policy states the following about a faculty member's right to appeal a suspension:

Faculty members have the right to convene an ad hoc committee in order to appeal either a decision to suspend the faculty member or a decision to dismiss the faculty member.

....

Should a faculty member request that such a committee be convened twice (i.e., once for suspension and once for dismissal), the membership of the committee may be similar or different....

Ex. 9 at DEF000250-DEF000251. Despite Marywood's suggestion that a faculty member does not have the right to convene two committees when his suspension and termination are premised on the same conduct, the terms quoted above could hardly be more clear about the right of a professor to convene an ad hoc committee to review his suspension even when the professor is also subject to termination. The drafters of the PD Policy may have believed that a suspension must be found justified before a termination could be found justified.

- (f) *Marywood improperly terminated Plaintiff's employment before any ad hoc faculty committee recommended doing so.*

The PD Policy states:

If the opinion of the Faculty Committee is that the matter is successfully resolved or that there is no merit to the complaint, a recommendation shall be made to discontinue proceedings. If the problem has not been corrected and reason still exists to question the fitness of the faculty member, the recommendation shall be to either continue a suspension or initiate a formal action toward dismissal.

Ex. 9 at DEF000251 (emphasis added). There is no dispute that President Anne Munley ("Munley") sent a letter on April 3, 2012 advising Fagal that his "employment with Marywood and your tenure are terminated effective today...." See Ex. 15; Ex. 40 at 141:18-142:10, 143:2-5; Ex. 67. This letter was sent before any ad hoc committee convened to review Fagal's discipline (despite his multiple requests beginning in February 2012)—let alone before any committee recommended his termination. See SMF ¶¶ 95-100; RSMF ¶¶ 72, 76, 95-100; Ex. 15; Ex. 47 at DEF000194, DEF000196; Ex. 48 at FFF001686-FFF001687; Ex. 57; Ex. 67.

**2. Marywood breached its Civil Rights Complaint Procedures.**

Plaintiff alleges that Marywood breached its Civil Rights Complaint Procedures ("CRCP") when it charged him with violating the Civil Rights

Policy in the absence of any civil rights complaint. See Ex. 4 at ¶¶ 42, 43.

Marywood counters that the CRCP states that “[i]n certain serious cases the University administrator may proceed even without a formal complaint.” See Def. Mem. 13-14.

Marywood is misreading the CRCP. The CRCP states that it “must be followed any time a member of the Marywood University community believes s/he has been the victim of or witness to discrimination, harassment, or assault by any member of the University community on University property or any property controlled by the University.” Ex. 21 at DEF3579. The CRCP requires that the complainant “must present the complaint to the appropriate University administrator.” Ex. 21 at DEF3579. The complainant may submit a “formal complaint” later. Ex. 21 at DEF3579. While Marywood is correct that “[i]n certain serious cases the University administrator may proceed even without a formal complaint,” the process still must begin with a “complaint.” See Ex. 21 at DEF3579.

**3. Marywood retaliated against Plaintiff for filing a grievance.**

Marywood’s Faculty Grievances and Appeals (“FGA”) Policy states that “[g]rievants will not be adversely affected for exercising their right to file a grievance, regardless of outcome” and that “[g]rievants will not be subject

to adverse consequences for either initiating a grievance or in presenting evidence on behalf of a grievant.” Ex. 10 at DEF000257.

On February 22, 2012, Fagal filed a grievance against Munley under the FGA Policy. See SMF ¶ 81; RSMF ¶ 81. On March 26, 2012, the Faculty Grievance Committee (“FGC”) rejected Fagal’s grievance. See SMF ¶ 83; RSMF ¶ 83. On April 3, 2012, eight days after the FGC’s decision, Munley terminated Fagal’s tenure and employment even though no ad hoc committee (“AHC”) had been convened let alone had recommended termination. See SMF ¶¶ 95-100; RSMF ¶¶ 72, 76, 95-100; Ex. 15; Ex. 47 at DEF000194, DEF000196; Ex. 48 at FFF001686-FFF001687; Ex. 57; Ex. 67.

Marywood argues that it could not have acted with a retaliatory motive because Fagal’s suspension and termination were initiated on January 23 and 24, 2012. See Def. Mem. 14. While Marywood is correct about the beginning of the proceedings, the actual date of termination was April 3, 2012. The timing of Munley’s letter suggests a retaliatory motive.

4. Marywood did not fulfill its procedural obligations in good faith.

Marywood argues that its review of Fagal’s discipline was “honest, meaningful and ‘not a sham formality designed to ratify an arbitrary

decision already made” and that it conducted itself in “good faith.” See Def. Mem. 17, 18. This is not quite true.

The AHC provided a pre-release draft of its decision to Marywood’s attorney “for comment” and received his “input” and “responses” despite having doubts about whether that attorney was an “independent voice” and despite being instructed that it needed to “come to [its] decision independently from the university.” See Ex. 36 at 32:5-33:16, 46:1-16, 53:13-17; Ex. 58 at DEF001512; Ex. 59 at 28:22-29:7; Ex. 60; Ex. 61; Ex. 63. This was the same attorney whom Fagal’s counsel had been corresponding with—in adversarial tones—beginning in February 2012. See Ex. 48; Ex. 62; Ex. 72. Before that attorney screened the AHC’s decision, he was in regular contact with the AHC. See Ex. 36 at 19:3-9, 54:5-56:7; Ex. 59 at 26:8-17 Ex. 61; Ex. 68.

The fact that Marywood allowed its attorney to communicate with the AHC and to shape the AHC’s decision strongly suggests that the AHC was not independent.

**E. Plaintiff did not “materially breach” the agreement.**

Marywood suggests that it was entitled to suspend the procedures that it created for the purpose of addressing even “serious violations” of University policy because Fagal’s alleged violations were “material

breaches” of University policy. See Def. Mem. 19-25. This argument is almost perfectly circular. Assuming that the “material breach” defense is even available under these circumstances, there would be a genuine issue of fact as to “materiality.”<sup>3</sup>

Materiality requires a “substantial showing” of several factors, including “the extent to which the injured party will be deprived of the benefit which he reasonably expected,” “the extent to which the party failing to perform or to offer to perform will suffer forfeiture” and “the likelihood that the party failing to perform or offer to perform will cure his failure.” *Int’l Diamond Importers, Ltd. v. Singularity Clark, L.P.*, 2012 PA Super 71, 40 A.3d 1261, 1271 (Pa. Super. Ct. 2012). The circumstances of this case suggest that Fagal did not materially breach his agreement with Marywood.

Marywood represents in its Faculty Handbook that its professors have the “rights and obligations of other citizens” and reminds them that “[a]s citizens engaged in a profession that depends upon freedom for its health and integrity,” they have a “particular obligation to promote conditions of free inquiry....” Ex. 21 at DEF3524. Marywood claims a commitment to a “tradition grounded on...individual rights”—a tradition that

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<sup>3</sup> Marywood is correct that materiality is generally an issue of fact. See Def. Mem. 19-20.

“posits...open discussion and unrestricted exchange of ideas.” Ex. 21 at DEF3522. Professors “maintain their right to criticize.” Ex. 21 at DEF3524. The Faculty Handbook also notes that the “primary” role of the faculty is to teach. See Ex. 21 at DEF3560. The University has a liberal disciplinary policy, making even violent acts and threats, theft against the institution, and carrying deadly weapons “subject to University disciplinary policies and procedures” or the PD Policy. See Ex. 11; Ex. 12; Ex. 13. The PD Policy contemplates “immediate harm.” See Ex. 9.

Here, a professor in his 25th year of service to Marywood and his 18th year of tenure was terminated for publishing a video parody of the Marywood administration’s reprehensible seizure of approved posters that Fagal had hung to inform the student body of a free speech event. See SMF ¶¶ 6, 29, 30, 31, 32, 36, 39; RSMF ¶¶ 6, 29, 30, 31, 32, 36, 39. The video was easily recognizable satire. See SMF ¶ 39; RSMF ¶ 39. Apparently no member of the Marywood community filed a civil rights complaint against Fagal. See RSMF ¶ 49; Ex. 15. Nor did anybody ask Fagal to remove the video, which he did anyway. See Ex. 15; Ex. 69. There is no objective evidence that Marywood’s reputation suffered because of Plaintiff’s video. There is no allegation that Fagal abandoned his primary role as a teacher or that his teaching skills suffered in any way. Given the

above-listed factors, it is a stretch to argue that Plaintiff's video parody was so substantial a breach as to permit Marywood to bypass its own disciplinary rules.

**F. Marywood waived any "material breach" by Plaintiff.**

A party alleging that it could suspend performance under a contract because another party materially breached that contract cannot then continue performance without waiving the breach. *Cf. Raddison Design Mgmt., Inc. v. Cummins*, No. 07-92, 2011 WL 818668, at \*6-7 (W.D. Pa. Mar. 2, 2011); *Fuller Co. v. Brown Minneapolis Tank & Fabricating Co.*, 678 F. Supp. 506, 509 (E.D. Pa. 1987); *Gillard v. Martin*, 2010 PA Super 238,13 A.3d 482, 487-88 (Pa. Super. Ct. 2010). Waiver is generally an issue of fact, but it can be decided as a matter of law "where only one reasonable conclusion can be drawn from the undisputed facts." *See Cedrone v. Unity Sav. Ass'n*, 609 F. Supp. 250, 254 (E.D. Pa. 1985) (citing cases).

Faced with an alleged material breach of contract, a party has only the following options:

When one party commits a material breach of contract, the other party has a choice between two inconsistent rights—he or she can either elect to allege a total breach, terminate the contract and bring an action, or, instead, elect to keep the contract in force, declare the default only a partial breach, and recover those damages caused by that partial breach—but the nonbreaching party, by

electing to continue receiving benefits pursuant to the agreement, cannot then refuse to perform his or her part of the bargain.

*Gillard*, 13 A.3d at 487 (quoting 13 R. Lord, *Williston on Contracts* (4th Ed. 1990), § 39:32, p. 645 (in pertinent part) (footnotes omitted)).

After Marywood's attorney alleged a "material breach" in a letter to Fagal's attorney, the University did not terminate the contract or bring an action against Fagal.<sup>4</sup> Instead, it elected to do all of the following:

1. offered to convene the AHC to review Munley's recommendation for Fagal's termination;
2. convened the FGC to adjudicate Fagal's grievance;
3. permitted Fagal to select a faculty member for the AHC;
4. convened the AHC;
5. permitted the AHC to deliberate over the course of several months and to reach a decision;
6. repeatedly referenced the written policies that it is now repudiating as if they remained in force; and
7. continued to pay Fagal through August 2012.

See Ex. 4 at ¶¶ 59, 66; Ex. 5 at ¶¶ 59, 66; SMF ¶¶ 71, 75, 77, 81-83, 95-97, 99, 100; RSMF ¶¶ 71, 75, 77, 81-83, 95-97, 99, 100; Ex. 62; Ex. 67 at

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<sup>4</sup> Marywood has not filed a counterclaim for breach of contract, and it is too late to do so now. See 42 Pa. Stat. and Cons. Stat. Ann. § 5525.

FFF001697; Ex. 71; Ex. 73. These facts strongly support that Marywood has waived any alleged material breach by Plaintiff.

Marywood cites *Norfolk Southern Railway, Co. v. Basell USA, Inc.*, a case decided under Delaware law, for the proposition that “a non-breaching party need not suspend performance of its duties after a breach of contract and risk exposure to liability should the breach be found to be immaterial.” See Def. Mem. 27-28. In fact, *Norfolk Southern* states that the non-breaching party must take that risk. See *Norfolk S. Ry., Co. v. Basell USA, Inc.*, No. 05-3419, 2008 WL 3832518, at \*6 (E.D. Pa. Aug. 15, 2008).

**G. Plaintiff has established resultant damages.**

Marywood argues that Plaintiff has not shown damages resulting from its breaches. Even if a plaintiff cannot show actual damages resulting from a breach, he is entitled to recover nominal damages. See *Wolfe v. Allstate Prop. & Cas. Ins. Co.*, 790 F.3d 487, 497 (3d Cir. 2015) (citing *Thorsen v. Iron & Glass Bank*, 328 Pa. Super. 135, 141, 476 A.2d 928, 931 (Pa. Super. Ct. 1984)).

Plaintiff has suffered actual and nominal damages. Before proceeding to the dismissal stage, the PD Policy required Marywood to: provide Fagal with at an oral warning; provide him with a written warning; satisfy itself that Fagal was an “immediate harm”; attempt remediation; and to wait for

remediation to fail. None of those events occurred, and Fagal has lost several years of salary as an inevitable result.

**VI. CONCLUSION**

For the foregoing reasons, Plaintiff Frederick F. Fagal, Jr. respectfully requests that Defendant's Motion for Summary Judgment be denied in its entirety.

Respectfully,

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*Attorney for Plaintiff*

Date: December 26, 2016

**CERTIFICATE REGARDING BRIEF LENGTH**

I, Jonathan Z. Cohen, attorney for Plaintiff, certify that the foregoing document contains 5,000 words.

Respectfully,

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Date: December 26, 2016

**CERTIFICATE OF SERVICE**

I, Jonathan Z. Cohen, attorney for Plaintiff, certify that the foregoing document has been filed electronically and is available for viewing and downloading from the ECF system. The following parties have consented to electronic service:

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